

# TERMS AND CONDITIONS OF TRADE

These terms and conditions apply from 16 September 2009

## 1. APPLICATION

- (a) Unless otherwise agreed in writing by Damar Industries Limited (**Damar**) and the customer (**Customer**) these terms and conditions (**Terms and Conditions**) will apply to the supply of any goods (including aerosol products, road safety products, timber products, solvents, pool care products, component goods and any related goods) by Damar to the Customer (**Goods**) and the supply of any manufacturing (including manufacturing Goods) packaging, warehousing and related services by Damar to the Customer (**Services**).
- (b) If there is any inconsistency between a provision of these Terms and Conditions and any provision in any other written agreement between the Customer and Damar, the provisions will apply in the following descending order:
- (i) the provisions in any agreement in writing between the Customer and Damar signed by Damar; and
  - (ii) the provisions in these Terms and Conditions;
  - (iii) provided that the provisions of these Terms and Conditions will prevail over any other terms and conditions stipulated by the Customer or included as part of any Customer documentation unless those terms and conditions have expressly been consented to and agreed in writing by Damar.
- (c) Damar may amend these Terms and Conditions at any time in its sole discretion. The amended Terms and Conditions will apply in respect of all Orders placed with Damar following the date the amended Terms and Conditions are first published on Damar's website at [www.damarindustries.co.nz](http://www.damarindustries.co.nz) or provided to the Customer in writing (whichever is the earlier).

## 2. ORDERS

- (a) The Customer will place written orders with Damar for Goods or Services in accordance with Damar's specified ordering process and in accordance with any minimum order quantities specified by Damar from time to time (**Order**). Each Order will constitute an offer to purchase the Goods or Services by the Customer which will only be accepted by Damar sending written confirmation of the Order to the Customer.
- (b) Damar may in relation to any Order accept the Order or decline to accept the Order in whole or in part, in its sole discretion. Orders are accepted by Damar subject to Damar's ability to supply the Goods or Services. Notwithstanding acceptance of an Order, Damar may cancel or

- (c) Any Order accepted by Damar may not be revised, altered or cancelled by the Customer once accepted by Damar unless consented to in writing by Damar. The Customer acknowledges that it will be a condition of any such consent that:
- (i) the Customer will pay to Damar:
  - (ii) (A) the full cost of any raw materials or components ordered by Damar in reliance on the Order, which will then be the property of the Customer; and
  - (iii) (B) a fair and reasonable charge for any costs incurred by Damar (including without limitation any labour or transportation costs) in relation to the Order; and
  - (iv) the Customer will purchase and pay the Price for all Goods and Services already produced or provided by Damar in reliance on the Order prior to the alteration, amendment or cancellation of the Order.

## 3. PRICE AND PAYMENT

- (a) The price payable for any Goods or Services supplied to the Customer (**Price**) will be:
- (i) the price agreed between the parties; or
  - (ii) in the absence of any agreement between the parties, Damar's standard charges applicable:
    - (A) for the Goods at the time of the acceptance of the Order by Damar; or
    - (B) for the Services at the time the Services are performed by Damar.
- (b) Damar may, by not less than 30 days prior written notice to the Customer, amend any Price in its sole discretion, which amended Price will apply in respect of Orders accepted by Damar after the expiry of that notice period.
- (c) Damar will invoice the Customer the Price for all Goods ordered and all Services provided on a monthly basis (**Invoiced Amount**).
- (d) The Customer will pay the Invoiced Amount in full and without deduction or set off by the 20th of the month following the date of the invoice to the Customer (**Due Date**).
- (e) The Price excludes GST (and any other relevant taxes and duties (if any)) which will be payable by the Customer in addition to the Price.
- (f) If the Customer fails to pay any amount owing to Damar in full on or before the Due Date, Damar may, without prejudice to any other right or remedy Damar may have:
- (i) charge the Customer (who will pay Damar on demand) default interest at 2% per month on the overdue amount, calculated daily from the Due Date until

INITIALS: \_\_\_\_\_

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- (ii) charge the Customer (who will pay Damar on demand) all actual costs (including without limitation all legal costs on a solicitor-client basis and all collection costs) incurred by Damar in the collection of such overdue amounts;
- (iii) cancel any discount provided to the Customer and require the Customer to pay the full Price; and
- (iv) refuse to deliver any Order, cancel or suspend any Order, place any overdue account on hold or stop providing credit facilities to the Customer and any related entity of the Customer.

### 4. DELIVERY

- (a) Delivery will be deemed to take place when the Goods are made available for collection by the Customer from Damar's premises (**Delivery**). If Damar agrees to arrange for the transportation of any Goods from Damar's premises on behalf of the Customer:
- (b) the Goods will be properly and suitably packed by Damar and in such manner as to reach the intended destination in good condition under normal conditions of transport;
- (c) Damar will act as the agent for and on behalf of the Customer and will not be liable for, or responsible for, any damage that occurs after Delivery, provided that it has complied with clause 4(a);
- (d) Damar will not be liable to the Customer for any loss of revenue, loss of profits or any other consequential losses or liabilities incurred by the Customer on account of any Goods not being delivered on any specified date; and
- (e) risk of loss or damage to any Goods will pass to the Customer on Delivery.

### 5. RISK AND TITLE

- (a) Unless otherwise agreed in writing, all risk of loss, damage, deterioration or destruction to the Goods will pass to the Customer on Delivery. Title to any Goods will not pass to the Customer until Damar has received payment in full for all Goods supplied to the Customer.
- (b) Until title to the Goods passes to the Customer under clause 5(a) the Customer will:
  - (i) hold the Goods as a bailee;
  - (ii) clearly designate the Goods as Damar's property and store the Goods in such a way that they are identified as Damar's property and not the Customer's; and
  - (iii) maintain the Goods in good order and condition and preserve the Goods in their present form.
- (c) Without prejudice to Damar's other rights and remedies, Damar will be entitled to retake possession of any Goods at any time prior to payment in full being received for those Goods. The Customer grants Damar an irrevocable right

and authority to enter onto any place where such Goods are situated, or thought to be situated at any time, and to take and resell the Goods and to retain the proceeds from such sale. Any shortfall arising from such sale will be a debt due and owing to Damar by the Customer.

### 6. PERSONAL PROPERTY SECURITIES ACT 1999

- (a) The Customer acknowledges that the retention of title in clause 5 gives rise to a security interest in all present and after acquired Goods supplied by Damar to the Customer to secure the Customer's performance of its obligations to Damar.
- (b) The Customer undertakes to:
  - (i) promptly do all things, execute all documents and/or provide any information which Damar may reasonably require to enable Damar to perfect and maintain the perfection of its security interest (including by registration of a financing statement);
  - (ii) give Damar not less than 14 days prior written notice of any proposed change in its name and/or any other change to its details; and
  - (iii) immediately on request by Damar (and at the Customer's expense) obtain from any third party such agreements and waivers of any security interest that third party has in the Goods, to ensure that at all times Damar has a first priority security interest in the Goods.
- (c) The Customer waives its rights to receive a copy of any verification statements under the PPSA and agrees that as between Damar and the Customer:
  - (i) the Customer will have no rights under (or by reference to) sections 114(1)(a), 116, 120(2), 121, 125, 129, 131, 133 and 134 of the PPSA; and
  - (ii) where Damar has rights in addition to those in Part 9 of the PPSA, those rights will continue to apply.

### 7. RETURN OF GOODS

- (a) Any claims by the Customer that any Goods supplied do not correspond to the relevant Order, or that any Goods received are defective, must be made in writing to Damar within 10 days after Delivery.
- (b) If no claim is received by Damar within the 10 day period the Customer will be deemed to have irrevocably accepted the Goods.
- (c) If a claim is made by the Customer in accordance with clause 7(a):
  - (i) the Customer will advise Damar of the defect in the Goods complained of and seek Damar's permission to return those Goods to Damar for verification (at the Customer's cost); and

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- (ii) subject to verification having been given, and on receipt of the Goods returned:
  - (A) if Damar supplied incorrect, or defective Goods, Damar will (at the Customer's election) either issue a credit note for the Goods or if possible transport the applicable replacement Goods to the designated delivery destination at no additional cost to the Customer; or
  - (B) if Damar has not supplied incorrect or defective Goods, or the claim is made outside the applicable period, then Damar will return the Goods to the Customer at the cost of the Customer and the Customer will have no further claim against Damar in relation to those Goods.

## 8. LIMITATION OF LIABILITY

- (a) Without prejudice to clause 7, the Customer acknowledges and agrees that:
- (b) Damar is not liable to the Customer in any manner whatsoever in connection with any breach of these Terms and Conditions, other than to compensate the Customer for the cost of replacement of any Goods under clause 7 or the cost of providing any replacement Services; and
- (c) nothing expressed or implied in these Terms and Conditions will confer any liability on Damar for any consequential, indirect or special loss, damage, cost or expense suffered or incurred by the Customer as a direct or indirect result of:
  - (i) a breach by Damar of any of its obligations under these Terms and Conditions; or
  - (ii) any use of the Goods otherwise than in accordance with relevant specifications.

## 9. SERVICES

- (a) If Damar provides any Services to the Customer, the following provisions will apply:
- (b) Where Goods ordered by the Customer require raw materials that are required to be purchased from overseas, or where there may be a delay in obtaining the raw materials, the Customer will provide a rolling 90 day forecast of its anticipated requirement for Goods on the first day of each month and covering the following 90 day period.
- (c) Damar will use reasonable efforts to meet any forecast provided by the Customer provided that Damar will not be liable to the Customer for any delay in fulfilling any Order where the quantity of any Goods ordered by the Customer during any month exceeds the Customer's forecast.
- (d) Damar may in its sole discretion require the Customer to pay to Damar in advance the cost

of any raw materials ordered by Damar in order to perform Services for the Customer.

- (e) In addition to the Price, Damar may charge to the Customer, and the Customer will pay to Damar, the cost of storing all raw materials or Goods in accordance with Damar's standard charges for the provision of such services from time to time.
- (f) Damar may in its sole discretion at any time by written notice to the Customer require the Customer to pick up and remove from Damar's premises any raw materials or Goods ordered by Damar to meet the Customer's forecast requirements.
- (g) If the Customer fails to remove any raw materials or Goods when required by Damar, Damar may forfeit and dispose of or destroy such raw materials or Goods by any method that it sees fit. Damar will not be liable to the Customer for any loss incurred by the Customer as a result of such disposal or destruction and the Customer will reimburse Damar on demand in respect of all costs incurred by Damar in relation to the destruction or disposal.

## 10. CONFIDENTIAL INFORMATION

- (a) The Customer will keep confidential all procedures, processes, techniques, specifications and technical data concerning any Goods or Services and the manufacture and utilisation of any Goods or Services, and any trade secrets and any other information relating to any Goods or Services (**Confidential Information**).
- (b) The Customer will not disclose or use the Confidential Information unless such disclosure or use is specifically authorised by Damar. The Customer will take all reasonable precautions to prevent such disclosure or use.
- (c) The Customer acknowledges and agrees that it has no right or licence to use any of the Confidential Information.

## 11. INTELLECTUAL PROPERTY

- (a) The Customer acknowledges and agrees that, as between the Customer and Damar, Damar will own all of the intellectual property rights (whether registered or unregistered) relating to the Goods, the Services and the Confidential Information (**Intellectual Property**) and all right and title to any actual or possible development or improvement in the Goods, the Services or the Confidential Information (**Development IP**).
- (b) The Customer acknowledges that it will not at any time acquire any right, title or interest of any kind in the Intellectual Property or any Development IP.

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## 12. NO WARRANTIES

- (a) Except as expressly warranted by Damar in respect of any specific Goods or Services, Damar makes no representation, warranty or undertaking (whether express or implied) in relation to the Goods and Services it provides (including without limitation as to the merchantability, quality, or condition of the Goods, compliance with the description of the Goods, the suitability or fitness of the Goods or Services for the Customer's purposes, or the use of the Goods or Services) and to the maximum extent permitted by law, all such representations, warranties and undertakings are negated and excluded.
- (b) Where the Customer is acquiring, or holds itself out as acquiring, any Goods or Services for the purposes of a business, in terms of section 43(2) of the Consumer Guarantees Act 1993 (**Act**), the Customer will not assert or attempt to assert any rights or claims against Damar under the provisions of the Act. The Customer acknowledges that it is not relying on Damar's skill or judgment as to the suitability or otherwise of the Services for any purpose.
- (c) Where the Customer on-sells any Goods to consumers who purchase those Goods for business purposes, the Customer will contract out of the Act in the same manner as provided in clause 12(b). If the Customer fails to do so, the Customer will indemnify Damar against any claim, expense or loss suffered or incurred by Damar as a direct or indirect consequence of such failure.

## 13. GENERAL

- (a) Damar may appoint subcontractors to discharge any of its obligations under these Terms and Conditions.
- (b) The Customer will not assign or otherwise transfer its rights or obligations under these Terms and Conditions to any person without the prior written consent of Damar.
- (c) To the extent permitted by law, Damar will not be liable for any act, omission or failure by it under these Terms and Conditions if that act, omission or failure results directly or indirectly from an event or circumstances beyond the reasonable control of Damar.
- (d) Any waiver by a party of any of its rights or remedies under these Terms and Conditions will be effective only if it is recorded in writing and signed by a duly authorised senior representative of that party. If the waiver relates to a breach of any provision of these Terms and Conditions, this will not (unless stated otherwise) operate as a waiver of any other breach of that provision. No waiver of any breach, or failure to enforce any provision, of these Terms and Conditions at any time by either party will in any way affect limit or waive that party's right to subsequently require strict compliance with these Terms and Conditions.
- (e) If any provision of these Terms and Conditions is or becomes invalid or unenforceable, that provision will be deemed deleted from these Terms and Conditions. The invalidity or unenforceability of that provision will not affect the other provisions of these Terms and Conditions, all of which will remain in full force and effect to the extent permitted by law, subject to any modifications made necessary by the deletion of the invalid or unenforceable provision.
- (f) These Terms and Conditions are governed by the laws of New Zealand. The parties submit to the non-exclusive jurisdiction of the New Zealand courts in respect of all matters relating to these Terms and Conditions.

By signing this, I acknowledge that I have read and understood these terms and conditions and agree to be bound by them.

Applicants Signature: \_\_\_\_\_

Date: \_\_\_\_ / \_\_\_\_ / \_\_\_\_